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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 84

UNITED STATES OF AMERICA,

Appellant,

—v.—

MILAN M. VUITCH, M.D.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR MILAN M. VUITCH, M.D.

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Questions Presented

I. Whether This Court Has Jurisdiction Under 18 U.S.C. §3731 to Entertain a Direct Appeal From a Decision of the United States District Court for the District of Columbia Dismissing an Indictment on the Ground of the Invalidity of the Statute on Which the Indictment Is Founded, Where the Statute Is an Act of Congress, but Applies Only in the District of Columbia.

II. Whether This Court Should Decline Jurisdiction Under 18 U.S.C. §3731, Where the District Court's Decision in This Case Could Have Been Taken to the United States Court of Appeals for the District of Columbia Pursuant to D.C. Code §23-105, When to Do So Would Overturn an Express Decision by One Coördinate Branch of the Federal Government—the Executive—to Avail Itself of a Statutory Alternative Expressly Provided by a Second Coördinate Branch of the Federal Government—the Congress—Based Solely Upon a Construction of 18 U.S.C. §3731 Which Is at Best Implicit in the Statute's Language.

III. Whether Disposition of This Appeal on the Merits Should Include Consideration of the Constitutional Claims Raised by the Motion to Dismiss, Supported by Briefs and Argument, and Considered by the District Court, Although Not Fully Ruled Upon, Where Remand for Trial Would Not Materially Advance the Inquiry on Those Points.

IV. Whether D.C. Code §22-201, Which Forbids a Physician to Perform a Therapeutic Abortion Unless "Necessary for the Preservation of the Mother's Life or Health" Is Unconstitutionally Vague and Indefinite, on Its Face and as Applied, Where the Statute Provides a Wholly Inadequate Warning to the Physician, Jury, and Judge of Which Physical, Mental, or Social Conditions May Be Taken into Consideration When Assessing Necessity.

V. Whether D.C. Code §22-201, as Applied to Impose Upon a Physician the Burden of Proof That an Abortion Was "Necessary for the Preservation of the Mother's Life or Health," Deprives Physicians of Liberty Without Due Process of Law by Eroding the Presumption of Innocence and Invading the Privilege Against Self-Incrimination.

VI. Whether D.C. Code §22-201 Deprives Physicians and Their Patients of Rights Protected by the First, Fourth, Fifth, and Ninth Amendments, and Is Void by Reason of Overbreadth, Where the Statute Is Neither Narrowly Drawn nor Supported by any Compelling or Legitimate Governmental Interests.

Statement of the Case

Appellee Milan M. Vuitch, M.D., a licensed and practicing physician in the District of Columbia, was charged by indictment (App. at 2, 3) with two alleged violations of D.C. Code §22-201, a statute of 1901 vintage.[1] Dr. Vuitch moved before trial to dismiss both indictments on the following grounds:

> "1. The statute . . . under which the indictment is brought is unconstitutional on its face and as applied to him.

[1] The indictments charged that Dr. Vuitch had produced abortions upon two patients, one on February 1, 1968, the other on May 1, 1968. Neither indictment averred that the abortions were not "necessary for the preservation of the [woman's] life or health . . . ." D.C. Code §22-201. The absence of such averment itself may be fatal to the indictments, as implied by *Williams* v. *United States*, 138 F.2d 81 (D.C. Cir. 1943); and *Crichton* v. *United States*, 92 F.2d 224, 225 (D.C. Cir.), *cert. denied*, 302 U.S. 707 (1937).

"2. The language of the statute as applied to a physician is vague.

"3. The statute interferes with the physician-patient relationship.

"4. The statute unconstitutionally restricts the patient's right of privacy and freedom of choice . . . ." (App. at 4).

The motion to dismiss, filed October 15, 1960, relied in large part upon the arguments set out in *California* v. *Belous*,[2] a decision of special relevance handed down only six weeks earlier by the Supreme Court of California.

After the receipt of extensive briefs, and oral argument, the district court, Gesell, *J.*, granted the motion and dismissed the indictments against Dr. Vuitch.[3] Judge Gesell addressed himself to three major contentions urged by Dr. Vuitch, but based the decision on the principal ground that the statute as interpreted was unconstitutionally vague and indefinite, in violation of the due process clause of the Fifth Amendment. 305 F. Supp. at 1034.

The district court recognized that

"the motions attack the statute for vagueness, allege that its practical operation denies equal protection to certain economic and other groups . . . and assert a constitutional right of all women . . . to determine whether or not they shall bear a child." 305 F. Supp. at 1033.

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[2] 71 Cal.2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (Sept. 5, 1969), *cert. denied*, 397 U.S. 915 (1970).

[3] A companion case, *United States* v. *Boyd*, 305 F. Supp. 1033, 1035-36 (D.D.C. 1969) (not appealed), went the other way, Boyd, a non-physician, had been charged with performing abortions.

Moreover, there was no need for extended hearings and testimony because "the materials cited in the briefs . . . are of such common understanding . . . ." 305 F. Supp. at 1033.

Relying for the most part upon his conclusion that the statute was too vague, Judge Gesell nonetheless agreed that "the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals." 305 F. Supp. at 1034. Reliance was placed on decisions by this Court such as *Griswold* v. *Connecticut*[4] and *Loving* v. *Virginia*.[5] These decisions were

> "an increasing indication . . . that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F. Supp. at 1035.

In addition, decisions by the United States Court of Appeals for the District of Columbia were seen to raise grave questions under the Fifth Amendment with respect to the presumption of innocence and the privilege against self-incrimination.[6] Those decisions held that

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[4] 381 U.S. 479 (1965). *Griswold* recognized as against state action, "a right of privacy older than the Bill of Rights—older than our political parties . . . ." 381 U.S. at 486, and extended constitutional protection to "the traditional relation of the family —a relation as old and as fundamental as our entire civilization . . . ." 381 U.S. at 496 (Goldberg, *J.*, concurring).

[5] 388 U.S. 1 (1967).

[6] *Peckham* v. *United States*, 226 F.2d 34 (D.C. Cir.) (per curiam), *cert. denied*, 350 U.S. 912 (1955); and *Williams* v. *United States*, 138 F.2d 81 (D.C. Cir. 1943), were cited as examples. Only *Williams*, however, actually decided the point. *Peckham* held that proof of pregnancy was irrelevant to commission of the offense.

> "upon the Government establishing that a physician committed an abortion, the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health." 305 F. Supp. at 1034.

Since the Government's establishing of an abortion could not *per se* justify a verdict of *illegal* abortion, Judge Gesell thought the Circuit Court's holdings "may well offend the Fifth Amendment . . . as interpreted in recent decisions such as *Leary* v. *United States*,[7] and *United States* v. *Gainey*."[8] Nonetheless, while recognizing potential merit in other points argued to the Court, Judge Gesell decided the case upon the principal ground that the statute was riddled with multifold uncertainties that could not be remedied. Hence, the statute was void for vagueness, and in violation of the due process clause of the Fifth Amendment.

In light of the above, it is clear that Dr. Vuitch raised the full range of constitutional questions. This was expressly done both in the motion to dismiss the indictment, and in reliance upon *California* v. *Belous, supra*. Moreover, the district court fully considered all questions, although deciding only one. Thus, it is incorrect to suggest that "several broad constitutional issues were presented to the court below by an *amicus curiae* . . . ." *Brief for the United States,* at 8; *id.* at 22-23. Moreover, the Appellants are incorrect in stating that *California* v. *Belous*,

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[7] 395 U.S. 6 (1969).

[8] 380 U.S. 63 (1965).

supra, rested solely on vagueness grounds. *Brief for the United States*, at 5 n. 3. Even a cursory reading of *Belous* shows that several presumptively definite constructions of the California anti-abortion law were rejected because they would infringe a "fundamental right of the woman to choose whether to bear children . . . ."* *Belous* was by no means limited to vagueness.

ARGUMENT

Jurisdiction

I.

This Court Has Jurisdiction Under 18 U.S.C. §3731 to Entertain a Direct Appeal From a Decision of the United States District Court for the District of Columbia Dismissing an Indictment on the Ground of the Invalidity of the Statute on Which the Indictment Is Founded, Where the Statute, Although an Act of Congress, Applies Only in the District of Columbia.

Dr. Vuitch does not contest the jurisdiction of this Court over a direct appeal such as the present. The language, legislative history, and decisions construing 18 U.S.C. §3731 (1964 ed.), all point to one conclusion. At its option, the United States may appeal directly to this Court from a decision of the United States District Court for the District of Columbia dismissing an indictment based upon an unconstitutional statute, where the statute, although an Act of Congress, applies only in the District of Columbia.

*71 Cal.2d at ——, 458 P.2d at 199, 80 Cal. Rptr. at 359.

The *Supplemental Memorandum of Appellee, Supplemental Memorandum for the United States,* and *Brief for the United States,* at 10-16, fully elaborate the jurisdictional point. Dr. Vuitch does not disagree with the conclusion. Moreover, no further supporting authorities have been found.

II.

The District Court's Decision in This Case Could Have Been Taken to the United States Court of Appeals for the District of Columbia Pursuant to D.C. Code §23-105, but This Court Should Not Decline Jurisdiction Under 18 U.S.C. §3731, Because to Do So Would Overturn an Express Decision by One Coördinate Branch of the Federal Government—the Executive—to Avail Itself of a Statutory Alternative Expressly Provided by a Second Coördinate Branch of Federal Government—the Congress—Based Solely Upon a Construction of 18 U.S.C. §3731 Which Is at Best Implicit in the Statute's Language.

The existence of D.C. CODE §23-105 raises the possibility that the United States might have an option to appeal a case such as the present one to the United States Court of Appeals for the District of Columbia. In exercising that option, the United States presumably would make an executive determination that the case lacked sufficient national import to warrant a direct appeal here. Appeal would then be taken pursuant to D.C. CODE §23-105, as was done in *United States* v. *Sweet,* 399 U.S. 517 (1970) (per curiam). And, as *Sweet* holds, this Court would respect the executive determination authorized by Congress in §23-105.

A similar need to respect the determinations of the Executive and Congress underlies the present procedural question. Acts of Congress, although frequently confined to the District of Columbia, often relate to questions of tremendous national concern. Indeed, with respect to criminal law and procedure, such Acts may be designed as models for the fifty states. While the present criminal statute permits abortion to preserve both the woman's "life" and "health," and is therefore unlike any state abortion law other than that in Alabama,[10] Dr. Vuitch claims that such a restriction is not only vague, but overbroad, in that its potential sweep drastically invades matters left by the Constitution to the private decision of the pregnant woman, other members of her family, and her physician. This claim of overbreadth entails implications for the abortion laws of the forty-seven states which, unlike New York, Alaska, and Hawaii, still consider the outcome of an unwanted pregnancy to be a matter between a majority of legislators and the physician and/or pregnant woman.

Assuming, then, that 18 U.S.C. §3731 (1964 ed.), need not always be utilized by the Executive, the present case

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[10] *See* ALA. CODE tit. 14, §9 (Recomp. 1958) ("unless the [abortion] is necessary to preserve her life or health . . . ."). Twenty-nine states exclude preservation of "health." *E.g.*, 40A MINN. STAT. ANN. §617.18 (1964); 2A TEXAS PENAL CODE art. 1196 (1961). Twelve states, following MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962), permit abortions in accredited hospitals for reasons of physical and/or mental health. *E.g.*, MD. CODE ANN. art. 43, §149(E)-(G) (Supp. 1970) ("substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the [woman]. . . ."). In 1970, three states enacted legislation—New York, Alaska, and Hawaii—along lines subsequently embodied in the UNIFORM ABORTION ACT (2d Tent. Draft Aug. 1970), which leave the *reasons* for abortion up to the physician and patient. *E.g.*, [1970], N.Y. Laws ch. 127, at 170, *amending* N.Y. PENAL LAW §125.05(3) (McKinney 1967).

is one in which the option has been exercised. Dr. Vuitch agrees that the course of appeal has been designated by Congress, subject to certain Executive options, and that this Court lacks discretionary authority to overturn the considered judgment of the other departments of government by rejecting the appeal.

Scope of Review

III.

Disposition of This Appeal on the Merits Should Include Consideration of the Constitutional Claims Raised by the Motion to Dismiss, Supported by Briefs and Argument, and Considered by the District Court, Although Not Fully Ruled Upon, Because Remand for Trial Would Not Materially Advance the Inquiry on Those Points.

The *Brief of the United States,* at 22-26, asks this Court to resolve only the vagueness point, which was central to the disposition below. As Dr. Vuitch has pointed out, however, additional constitutional arguments were raised below, briefed, argued, and examined by the district court. The Government would ask that this litigation be carried out in piecemeal fashion, with each issue litigated from the district court to this Court, in sequence, until all procedural and substantive points had been fully adjudicated by all judges in each possible forum. Remand for further hearings, however, would not materially promote the ultimate resolution of this case. This is the lesson taught by the numerous lower courts that have passed on the "overbreadth" claims raised herein.

California v. *Belous*[11] is a first example. In that case the Supreme Court of California invalidated the pre-1967 California anti-abortion law as unduly vague and overbroad. Dr. Belous had been tried and convicted of conspiracy to violate the anti-abortion statute. The trial, however, was concerned with the facts of the offense, not with factual background for the constitutional claims. Indeed, none of the facts developed at the trial turned out to have the least bearing upon the ultimate decision. The decision relied upon recognized medical literature to bolster its conclusions. A trial as to this factual background would have been no more than an endless conflict between competing experts from opposing camps. The conflict has already been mooted in the medical journals at length and in depth. It need not be inscribed into thousands of pages of trial transcript to be brought to this Court's attention.

Judge Gesell recognized below that "judicial notice" could be taken "of the materials cited in the briefs." 305 F. Supp. at 1033. Similar federal decisions, by statutory three-judge courts, have recognized that the overbreadth question is a matter of constitutional law. The restrictions on abortion in Wisconsin,[12] Texas,[13] and Georgia[14] were all examined and declared unconstitutionally overbroad without the need for an extended trial. Dr. Vuitch has presented

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[11] 71 Cal.2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

[12] *McCann* v. *Babbitz*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal docketed*, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term).

[13] *Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam).

[14] *Doe* v. *Bolton*, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam).

the relevant medical literature in this *Brief* and the *Motion to Affirm*. There is no reason to remit the case for what, in effect, would be a reargument of substantive points brought out fully below.

Dandridge v. *Williams*[15] teaches the propriety of an Appellee's urging on appeal grounds for decision that were briefed and considered below, but not relied upon by the lower court. As Mr. Justice Stewart stated:

> "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. . . .
>
> "The issue having been fully argued both here and in the District Court, consideration of the [issue] is appropriate." 397 U.S. at 475 n. 6.

The Court in *Dandridge* sustained the Maryland maximum grant regulation on both statutory and constitutional grounds, the lower court having rested solely on the latter. By the Government's theory here, this Court in *Dandridge*, having rejected the constitutional arguments, should have remanded the case to the district court for an opinion on the statutory construction claims. The Court's more sensible approach, however, avoids piecemeal litigation, and resolves important public questions in a timely fashion. Here, as in *Dandridge*, a substantive decision will directly affect the lives of many thousands of people. Not only has the lower court heard argument on the merits, but numerous other district courts have resolved substantially similar overbreadth claims.

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[15] 397 U.S. 471 (1970).

The Merits

IV.

D.C. Code §22-201, Which Forbids a Physician to Perform a Therapeutic Abortion Unless "Necessary for the Preservation of the Mother's Life or Health" Is Unconstitutionally Vague and Indefinite, on Its Face and as Applied, Because the Statute Provides a Wholly Inadequate Warning to the Physician, Jury, and Judge of Which Physical, Mental, or Social Conditions May Be Taken into Consideration When Assessing Necessity.

A. *The District Court's Decision Properly Accorded Dr. Vuitch Standing to Challenge the Statute on Its Face*

The Government contests Judge Gesell's decision to consider Dr. Vuitch's challenge to the District of Columbia anti-abortion statute *on its face,* rather than *as applied* to whatever facts might have developed at an evidentiary hearing. In allowing the defense to attack the facial validity of the statute, however, the lower court was not only in accord with the three-judge federal court decisions rendered in Wisconsin,[16] Texas,[17] and Georgia,[18] but also appears to have recognized that no substantial class of instances exist to which the statute could be applied without substantial post-offense reconstruction, and concomitant lack of fair warning. Moreover, failure to consider the statute on its face would have compounded the deterrence of the entire class of physicians who suffer under the

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[16] *McCann* v. *Babbitz, supra* note 12.

[17] *Roe* v. *Wade, supra* note 13.

[18] *Doe* v. *Bolton, supra* note 14.

burden of a law with such significant possibilities for prosecutorial abuse.

The substantive rights of individual liberty and privacy asserted by Dr. Vuitch follow from the recognition in *Griswold* v. *Connecticut*,[19] of "a right of privacy older than the Bill of Rights—older than our political parties . . ."[20] which surrounds with constitutional protection "the traditional relation of the family—a relation as old and as fundamental as our entire civilization . . . ."[21] The constitutional basis for these rights will be developed in greater depth, *infra*, at pp. 34 to 69. For the present, however, it is important to note the significance attached to these rights by the *Griswold* decision. So important did *Griswold* consider the right of privacy, that physicians had standing to assert the right on behalf of "the married people with whom they have a professional relationship." 381 U.S. at 481. Following the *Griswold* rationale, Dr. Vuitch should have standing to test the facial validity of the statute, because it invades the privacy rights of that broad class of patients, with infinitely variable physical and mental "health" situations, who are prevented from obtaining abortions because physicians generally fear prosecution.

One cannot conceal from judicial notice the general inhibiting effect of the statute by pointing to an absence in the record of evidence to that fact. Physicians in the District of Columbia more often than not, for example, are members of the American Medical Association. That Association in June of this year called for an approach to

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[19] 381 U. S. 479 (1965).

[20] 381 U.S. at 486.

[21] 381 U.S. at 496 (Goldberg, *J.*, concurring).

abortion which would leave the decision up to physician and patient, after consultation, provided the abortion was performed in an appropriate medical facility.[22] This is evidence of dissatisfaction with existing laws. Such dissatisfaction derives from inability to practice sound medicine, taking into consideration all of a patient's health and personal needs, when the physician's definition of "health" might not agree with that of a local prosecutor, or jury, and the difference entails a possibility of being "imprisoned in the penitentiary not less than one year or not more than ten years . . . ," D.C. CODE §22-201, as well as revocation of the physician's license to practice medicine, D.C. CODE §2-123. In no other area of law's relationship to medicine must a physician work under such a drastic threat of punishment.

Accordingly, it is not speculative to conclude that the D.C. abortion law drastically inhibits the practice of medicine, and the access of patients to this particular form of medical treatment. If this were not so, the A.M.A. would have no reason to adopt a policy position contrary to what is presently allowed by law. Nor would leaders of the medical profession have given their support to litigation brought to contest similar laws in other jurisdictions. *See Brief of the Association of the Bar of the City of New York and a Group of Physicians as Amici Curiae,* at i-xi, *Hall* v. *Lefkowitz;*[23] *Amicus Curiae Brief on Behalf of Medical*

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[22] *See* N.Y. Times, June 26, 1970, at 1, col. 1. The text of the official position has not yet been published in J.A.M.A., although the Journal recently noted that only 26 physicians had resigned from the body because of the new policy. *See* 213 J.A.M.A. 1242 (Aug. 24, 1970).

[23] 305 F. Supp. 1030 (S.D.N.Y. 1969), *dismissed as moot,* Op. No. 36939 (S.D.N.Y. July 1, 1970) (per curiam) (statute repealed three days before oral argument on merits).

School Deans and Others in Support of Appellant, at 2, *California* v. *Belous*.[24]

In light of the constitutional stature of the rights asserted by Dr. Vuitch, and the pervasive impact which the challenged statute invariably has upon the practice of medicine, the validity of the statute must be assessed on its face, not by the piecemeal process of hammering out its permissible contours on a case-by-case basis.

B. *The Statute Is Facially Invalid Because There Are No Substantial Classes of Situations to Which Its Terms Could Apply Without Objectionable Vagueness*

The Legal Standard

A vast body of case law exists on the problem of unconstitutional uncertainty.[25] This doctrine has, moreover, several complementary, and several competing strands. The test most frequently articulated has been that

> "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . . ."[26]

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[24] 71 Cal.2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

[25] *See generally* Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORN. L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921); Note, 62 HARV. L. REV. 77 (1948).

[26] *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

This is partly because

> "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." [27]

Clearly, "[v]ague laws in any area suffer a constitutional infirmity," [28] be they of common law antiquity,[29] administrative,[30] or criminal.[31] Furthermore, statutes challenged for vagueness which impinge upon sensitive human rights are to be closely scrutinized. *Griswold* v. *Connecticut* dealt with "a right of privacy older than the Bill of Rights . . ." [32] and that right is invoked again here, as well as the right to give medical advice, which is more nearly a facet of pure freedom of speech. Thus, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." [33]

This Court has never ruled on a vagueness challenge to a similar statute, but the invalidity of the language follows

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[27] *United States* v. *Reese*, 92 U.S. 214, 221 (1875).

[28] *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

[29] *Lanzetta* v. *New Jersey*, 306 U.S. 451, 454-55 (1939); *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 242-43 (1932). *See also United States* v. *Evans*, 333 U.S. 483 (1948), in which the statute had been passed in 1917; and *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

[30] *See, e.g., Keyishian* v. *Regents*, 385 U.S. 589 (1967).

[31] *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

[32] 381 U.S. 479, 486 (1965).

[33] *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

from an analysis of the difficulties a physician must face in applying it.

Vagueness of the Statute in Practice

Both medical and legal commentary have recognized the uncertainty of American abortion laws. Retired Justice Clark recently remarked:

> "The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute . . . . [D]octors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability." [84]

Christopher Tietze, M.D., perhaps internationally the most knowledgeable authority on abortion practices and statistics, commented

> "The application of these laws, however, varies greatly between localities and between hospitals." [85]

Similarly, a 1967 study concluded:

> "Abortion policies vary not only from hospital to hospital but also from service to service within the same

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[84] Tom C. Clark, *Religion, Mortality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1, 7 (1969) [hereafter "Clark"].

[85] Tietze, *Maternal Mortality Associated With Legal Abortion*, Proceedings of the Fifth International Conference on Planned Parenthood 24 (Oct. 1955) (Tokyo); *see also* M. CALDERONE, ABORTION IN THE UNITED STATES 34-35, 52 (1958):

> "[N]ecessity as a sine qua non of performing an abortion . . . leaves the doctor's position perilous and uncertain. * * * The current laws provide no accurate criteria by which the doctor can govern his actions."

hospital. They also vary widely from doctor to doctor on the same service of the same hospital." [36]

And, as Dr. Alan F. Guttmacher indicated in an early study, "[t]he doctor's dilemma lies in the phrase 'preserving the life of the woman.'" [37] If "preserving life" is a difficult standard, then "preserving health" only accentuates the "doctor's dilemma."

The medical profession has no experience in applying the provisions of felony statutes to the day-to-day practice of their science. It is not an offense to perform an appendectomy far in advance of rupture, and when only necessary to prevent a risk that might never materialize. General malpractice principles, which take all circumstances into account, govern the physician's everyday practice, not the criminal law. Nor is an instance of malpractice *per se* ever a cause for license revocation, much less criminal prosecution, unless so serious, wanton, and reckless as to constitute criminal negligence. While the physician's professional role is directed toward preserving a patient's *health*, that term is used in its broadest sense:

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[36] Hall, *Abortion in American Hospitals*, 57 AM. J. PUB. HEALTH 1933, 1935 (1967). Dr. Hall continues:

"The victim of all this confusion is, of course, the American female . . . [S]he must find Doctor X in hospital Y with policy Z in order to have it done." *Id.*

For a vivid illustration of the variations among hospitals in assessing the legality of therapeutic abortion on a given set of facts, see the questionnaire study and analysis of results in Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 423 (1959). The study is discussed and relied on in *California* v. *Belous*, 71 Cal.2d ——, ——, 458 P.2d 194, 205 n. 14, 80 Cal. Rptr. 354, 365 n. 14 (1969).

[37] Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. MT. SINAI HOSP. 111 (1954).

"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [38]

In no sphere of medicine other than abortion does a criminal statute impose such a burden upon a physician, and in no other sphere of medical practice is treatment restricted by criminal law to those instances in which it is "necessary for the preservation of the mother's life or health." The Court might consider the impact on the lives of all citizens if a penal statute prohibited gall bladder surgery, kidney stone removal, the prescription of contraceptives,[39] use of antibiotics, vaccination, or even the taking of aspirin "unless necessary for the preservation of the life or health" of the patient. There are and never have been such laws or practices, outside of the quite different realm of drug regulation. It is from this area that Appellant has drawn *Linder* v. *United States*, 268 U.S. 5 (1925), and *Boyd* v. *United States*, 271 U.S. 104 (1926), on which great reliance was placed (J.S., at 7; *Brief*, at 36).

Linder and *Boyd* involved the question of a physician's dispensing "hard" narcotics (i.e., morphine and cocaine).

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[38] *Constitution of the World Health Organization*, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.).

[39] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), at least implies that such a requirement would violate the patient's right of privacy, but Connecticut, for obvious reasons, made no such contention.

The statute required that this be done "in the course of his [the physician's] professional practice only."[40] This Court found in *Linder* that "[w]hat constitutes *bona fide* medical practice must be determined upon consideration of evidence and attending circumstances." 268 U.S. at 18. This was not a decision, as Appellant stated, that "the statute was subject to an absolute defense of good faith belief by the physician that the drugs were appropriate for treatment of the addict" (J.S., at 7; Brief, at 36).

In several respects *Linder* and *Boyd* are inapposite and inapplicable. Trafficking in hard narcotics is socially reprehensible conduct, for which statutory standards of specificity need not be so stringent. Abortion, like contraception, however, involves sensitive individual rights, see *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), and most frequently the "intimate relation of husband and wife and their physician's role in one aspect of that relation." Privacy in family planning is today a value which government promotes. Moreover, the problem of hard narcotics is susceptible to much sharper analysis than that of abortion. One can separate out the physician who helps an addict withdraw from one who feeds a habit for profit. With abortion, however, there is no such line, and the statute has not drawn an intelligible point of demarcation.

Many physicians consider a woman's strong personal desire not to be compelled to have further children, as sufficient justification for abortion. A study conducted by the journal Modern Medicine in fact showed that 51% of American physicians, and 61.4% of physicians in the District of Columbia agreed without qualification that abor-

[40] Harrison Narcotic Law, 38 Stat. 785, *as amended*, 40 Stat. 1130.

tion should be available to any woman capable of giving legal consent upon her own request to a competent physician.[41] The sphere of medical judgment, in such a case, then narrows to the question of whether medical reasons exist for *not* performing the requested abortion, a circumstance which is exceedingly rare (and unregulable by the blunderbuss of a criminal statute) in this day when abortion in early pregnancy is seven times *safer* than its alternative—childbirth.[42]

In fact, if one compares the relative safety of childbirth and medically induced abortion in early stages of pregnancy, he will necessarily conclude that abortion in almost all cases is "necessary for the preservation of the [woman's] life or health." D.C. CODE §22-201. This is the case because childbirth today carries a considerably more significant risk to the woman's survival than abortion.

Tietze published a study in September of 1969 which summarized the relevant data as follows:

> "*Mortality* associated with *legal abortion* performed in hospital, at an early stage of gestation: *3 deaths per 100,000 abortions . . .*"[43]

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[41] *Modern Medicine*, Nov. 3, 1969, at 18-24. An additional 11.8% nationally and 11.2% in the District agreed to the proposition, but with some qualification.

[42] *See* Tietze, *Mortality With Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969).

[43] Tietze, *Mortality With Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969) (emphasis in original). For further substantiation of the safety of early abortion on healthy women under appropriate medical conditions, see Tietze, *Abortion Laws and Abortion Practices in Europe* (1969); Tietze, *Abortion*

"*Maternal Mortality* from complications of, or associated with, pregnancy, child-birth, and the puerperium, *excluding induced abortion: 20 deaths per 100,000 pregnancies.*" [44]

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"*Mortality* associated with *highly effective contraception: 3 deaths per 100,000 users per year . . . .*" [45]

Moreover, physicians in states with liberalized practice are increasingly discarding conventional concepts about the need for hospitalization. A recent study by physicians at the University of California, San Francisco, School of Medicine showed relatively few complications following therapeutic abortions done on an outpatient basis.[46] The researchers concluded that

> "the conventional 12- to 48-hour hospital admission for aspiration abortion patients serves no real purpose either in preventing or discovering postabortal complications." [47]

Accordingly, the conscientious physician who takes into account the physical, mental, and personal needs of his

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in Europe, 57 AM. J. PUB. HEALTH 1923 (1967); Tietze & Lewit, *Abortion*, 220 Scientific American 3 (Jan. 1969); Kolblova, *Legal Abortion in Czechoslovakia*, 196 J.A.M.A. 371 (1966); Mehland, *Combatting Illegal Abortion in the Socialist Countries of Europe*, 13 WORLD MED. J. 84 (1966).

[44] *Id.*, based on the United States "rate of maternal mortality, excluding abortion, [which] was 18 per 100,000 live births in 1964-66." *Id.*

[45] *Id.*, citing Inman & Vessey, *Investigation of Deaths from Pulmonary and Cerebral Thrombosis and Embolism in Women of Child-bearing Age*, 2 BRIT. MED. J. 193 (1968).

[46] Margolis & Overstreet, *Legal Abortion Without Hospitalization*, 36 OBST. & GYNEC. 479 (1970).

[47] *Id.* at 481.

patient, faces an insoluble dilemma in construing the statute. It is hopelessly vague. There are "health" justifications[48] for performing an abortion upon a "healthy" patient, because continued pregnancy could lead to dangers in childbirth, as well as adverse consequences to "health" brought about solely on account of her being forced to bear a child against her will. A physician can never know how the prosecutor, grand jury, trial judge, or jury of non-peer laymen will understand the term "health." If medical men cannot agree on the contours of the "health" concept, non-medical men are likely to indulge in interpretations which range from a need to protect the patient's immediate existence to the broader definition set out by the World Health Organization.

Where the "intent" of Congress lies, no one can know. Indeed, the Government has virtually conceded the facial invalidity of the statute by recognizing the futility of any construction cast in language other than that of the physician's subjective intent. How, one might ask, can the physician intend that which cannot be defined? There is no class of instances where abortion is plainly unnecessary[49]

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[48] A 1943 decision delivered by then Associate Justice Arnold of the Court of Appeals for this Circuit found that this provision of the statute "is a broad exception without precise limits." *Williams* v. *United States*, 78 U.S. App. D.C. 147, 150, 138 F.2d 81, 84 (1943). *Compare Musser* v. *Utah*, 333 U.S. 95, 97 (1948) ("acts injurious to public morals" may include "almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health [etc.] . . . .").

[49] The statute also gives no indication as to which of the possible meanings of "necessary" applies, nor the factors which may permissibly be taken into account. The judge and jury are permitted to consider any factors they choose. A statute which permitted only "necessary" noise was recently struck down by a district court in Pennsylvania. *Phillips* v. *Borough of Folcroft*, 305 F. Supp. 766 (E.D. Pa. 1969) (J. S. Lord, III, *J.*). This Court in *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500 (1926) (Taft, *C.J.*), has described the

to achieve legitimate health objectives. The dangers of childbirth to a woman who has an unwanted pregnancy will always exceed any hypothetical medical disadvantages of an abortion.

C. *The Statutory Construction Suggested by the Government Would Increase the Uncertainty of Coverage, and Render the Statute Meaningless to an Extent Beyond Any Possible Coverage Supported by Legislative History*

The Government seeks to salvage the statute by recommending an *ad hoc* determination in each case, focusing upon whether "the defendant, although a licensed physician, does not exercise 'medical' judgment" in performing the questioned abortion (*Brief for the United States,* at 28; *id.* "medical judgment"; *id.* at 29 " 'hard-core' conduct"; *id.* at 32 "good faith"; *id.* at 37 n. 29 "bona fide pre-abortion examination," "arguable health grounds"). Such efforts to hold on to the statute, by importing a lawyer's misunderstanding of the practice of medicine into the operating room, are a serious encroachment upon the physician's and patient's need to have clear guidelines, or none at all (beyond those provided for *all* forms of medical practice by malpractice law and administrative licensing sanctions).

A requirement that a physician prove he exercised "good faith" and rendered a "medical judgment" is even more uncertain than the statute's requirement of necessity for preservation of "health." The Government does not define "medical judgment," nor can a ready definition be found. This could mean a carefully reasoned judgment that the patient fits the statute. That approach, however,

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term "necessary" as one of "great indefiniteness," 271 U.S. at 517, "a vague requirement and one objectionable in a criminal statute." 271 U.S. at 518. It is indeed.

brings one back to the multiple ambiguities of the statute. To render a "good faith" "medical judgment" that the statute is satisfied would surely require that the statute itself be reasonably specific, which it is not.

Equally far fetched are interpretations which withhold the criminal sanction where "arguable health grounds" existed, or where there was a "bona fide pre-abortion examination." "Arguable" health grounds may have been clear to both physician and patient, but unpersuasive to prosecutor and jury. Similarly, the Government's unelucidated notion of a "bona fide pre-abortion examination" would enmesh court and jury in preposterous determinations of how long and what kind of pelvic examinations a physician must make to be exempt from criminal liability. Congress could hardly have intended to regulate the duration and quality of pelvic examinations when enacting in 1901 a statute on abortion.

A more serious defect in the Government's proposed interpretation is its consequence for the physician and patient. If one supposes that two physicians perform two abortions under identical circumstances, but one physician personally feels his act was illegal, while the other does not, only the former will be guilty because the latter acted in good faith. Both, however, to establish good faith, must bring forth proof in their own defense. If the subjectively guilty physician is a good actor, and conceals his original state of mind, but the innocent physician acts poorly, and becomes confused on cross-examination, the verdicts may conflict with reality. Under the statute, of course, neither physician will ever know whether he actually violated the intent of Congress. Yet, the subjective evaluation of his testimony by a randomly drawn jury of non-peer laymen will serve as a future guide of sorts to

the entire District of Columbia medical profession. Congress could never have intended such bizarre consequences when enacting this statute.

Appellant submits that the only sensible analysis of the statute is one which candidly recognizes its hopeless ambiguity. The efforts of lawyers to inject relevant meaning into the provisions of the law in question can only subvert the role of Congress and confuse the medical profession. In 1901, when the statute was passed, medicine was in a period of relative infancy. Wonder drugs, complex surgery, concepts of physical vs. mental health, and the entire modern-day realization of the patient's complexity were unknown quantities. It is not unkind to state in 1970 that a statute, presumably valid when passed, has become too vague in light of intervening medical and intellectual developments. Accordingly, there is no impropriety in this Court's invalidating the statute for vagueness, and inviting Congress to make a fresh start, taking into account the medical opinion of 1970, and the advances in medical science over the last sixty-nine years. Indeed, the impropriety would lie in attempting to salvage some remnant of the statute, by seeking to discern some possible construction to save at least the skeleton of what was passed in 1901. Particularly is this the case, where the Government's suggested constructions would open the door to prosecutorial indiscretion. In recognition of the impropriety of engrafting vague exceptions onto an already vague statute, this Court should exercise judicial restraint. Restraint in the present case entails deference to the role of Congress in casting the language of statutes. That role cannot be preserved unless the Court takes the only course which will remit the case to Congress. That course is a candid holding that Congress expressed itself imperfectly in 1901, and must reconsider the question. For this reason, the statute should be declared void on its face.

V.

D.C. Code §22-201, as Applied to Impose Upon a Physician the Burden of Proof That an Abortion Was "Necessary for the Preservation of the Mother's Life or Health," Deprives Physicians of Liberty Without Due Process of Law by Eroding the Presumption of Innocence and Invading the Privilege Against Self-Incrimination.

The settled law of the District of Columbia holds that necessity for an abortion is entirely a matter of justification for the defense. Neither the indictment, apparently, nor the prosecution, need aver or prove that the abortion was unnecessary. Judge Arnold, writing in *Williams* v. *United States,* 138 F.2d 81 (D.C. Cir. 1943), stated the question as follows:

> "[W]hether the statute making abortion a crime in the District of Columbia puts the burden on the prosecution to prove as a part of its case that the operation was not necessary for life or health."

Answering the question in the negative, the *Williams* court sustained the conviction of a non-physician for abortion although "[n]o evidence was offered by the government to support" a finding of lack of necessity. Defendant Williams had based her denial of guilt upon the theory that she had no connection whatever with the aborted woman, a defense theory inconsistent with the possibility of an affirmative defense of justification.

In two respects this District rule violates the constitutional rights of Dr. Vuitch as it would be applied in any trial on the charges pending against him.

As a preliminary point, one must note that the underpinnings of the *Williams* case have been seriously eroded in the ensuing twenty-seven years since 1943. No longer is "abortion . . . generally regarded as heinous in character." The American Medical Association and the Commissioners on Uniform States Laws do not generally recommend conduct deemed heinous. Today the taboo surrounding the word "abortion" has been lifted. The subject is debated in its full significance, and judged by more sophisticated standards than those which prevailed in 1943 when manpower was needed to fight a major war.

Similarly, the fear expressed by *Williams* of "the alarming death rate . . . due to secret operations by unskilled criminal abortionists" is more beside the point today, with modern antibiotics, than it was in 1943. In either case, it was the felony punishment for abortion which promoted secrecy, not the nature of the operation itself. Physicians, chilled by the prospect of prosecution under a statute which *Williams* described as containing "a broad exception without precise limits," were most unlikely to risk their liberty, license, and livelihood for the patient's sake, unless the necessity was beyond debate in any quarter, including the most hostile. Today, both the high death rate and the secrecy are no more. The wealthy patient can afford massive psychiatric documentation of danger to her "health," or can fly to a jurisdiction with more specific and lenient laws on abortion. Only the underprivileged minority is left with the midwife and kitchen knife, and they have access to the emergency rooms, if not the private pavilions, of local hospitals for recovery.

The light assumption in *Williams* that an accused has more ready access to proof of necessity for abortion will

also not stand up under scrutiny. The prosecution has complete access to all facts which occurred outside the operating room, including any information which might pertain to the patient's "health" prior to the abortion. Moreover, the prosecution may, by post-abortal examination of the patient, gather further evidence from her and examining physicians. In no case need the patient fear self-incrimination, for she can be guilty of no offense, regardless of the pervasive role she plays in inducing a physician to perform the abortion. *See Hunter* v. *Wheate,* 53 App. D.C. 206, 289 Fed. 604 (1923). Thus, she can be compelled to testify, and to provide leads for the full range of evidence that may be necessary to convict.

In addition, the constitutional rights to a presumption of innocence, and the privilege against self-incrimination, have grown in stature since 1943. Prosecutorial convenience does not weigh so heavily today as then, nor are defendants lightly put to the task of describing the very acts with which they are charged, in order to convey an impression sufficiently different from that of the prosecution's case to create a reasonable doubt in the minds of the jurymen.

The felony abortion statute, as construed in *Williams* violates the due process clause of the Fifth Amendment by reversing the presumption of innocence, because the physician must take the burden upon himself of proving that the abortion was necessary to preserve the woman's "health." To undertake such proof, the physician must first waive any defense based upon not having participated at all in the alleged offense. He must admit what the indictment states, that he performed the abortion, and prove that the act was justified.

A long line of decisions by this Court, carefully reviewed by the Eighth Circuit *en banc* in *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir. 1968) (*en banc*), establishes the presumption of innocence on its constitutional plane. As this Court stated in *Deutch* v. *United States*:

> "'One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.' Irving v. Dowd, 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence." 367 U.S. 456, 471 (1961).

Plainly, this right is invaded when a physician can be convicted solely because he performed an abortion, and without further proof.

Necessity is not a collateral matter, like self-defense. With respect to abortion, the circumstances under which the procedure was undertaken go to the very heart of the matter. It is not every abortion which the statute condemns, but only a special, opaquely defined class. *Williams* incorrectly states that the exceptions are collateral and affirmative justifications. In every case, however, the center of the controversy will be whether the abortion in question fell within the exception. Abortions *per se* are no offense. It is only unnecessary abortions which the statute proscribes. Under a broad definition of "health," there are few, if any, unnecessary abortions. Under other definitions, there may be more, or many. By presuming that all abortions are legally unnecessary, the Government may convict, as it did in *Williams*, upon no more than a showing persuasive to the jury, that the physician performed the abor-

tion. It is presumed, unless the physician shows otherwise, that the abortion was unnecessary. In other words, District practice under *Williams* presumes, upon proof of one element of the offense, that the second element is present, that the accused is guilty. This presumption of guilt cannot stand in light of the constitutional status of the presumption of innocence under the due process clause of the Fifth Amendment.[50]

A related infirmity of the *Williams* rule inheres in its inevitable invasion of the Fifth Amendment privilege against self-incrimination. *Williams* requires that the physician bring forth evidence that the abortion was necessary to preserve the patient's "health." This means that the accused physician stands mute at penalty of certain conviction because of his failure to testify. If he testifies, however, he must admit the very fact of the abortion, *i.e.*, complicity in one element of the offense, and then attempt to persuade the jury that the second element of the offense was not present. If the jury finds his "health" justifications insufficient, or that his "good faith" was not "good enough," the physician has been convicted upon his own testimony. Moreover, if the jury had not believed the prosecution's evidence that an abortion was performed, the physician's testimony could supply proof from his own mouth of *both* elements of the offense.

Leary v. *United States*, 395 U.S. 6 (1969), teaches that the *Williams* rule must be held to violate the privilege

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[50] Authorities recognizing the constitutional status of the presumption of innocence go back to *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 328 (1866). *See also United States* v. *Romano*, 382 U.S. 136, 139-44 (1965) (presence at still does not justify inference that accused possesses or controls the still); *Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958); *Morissette* v. *United States*, 342 U.S. 246, 274-75 (1952); *Morrison* v. *California*, 291 U.S. 82 (1934).

against self-incrimination. In *Leary*, registration and payment under the Marihuana Tax Act "compelled [an accused] to expose himself to a 'real and appreciable' risk of self-incrimination . . . ." 395 U.S. at 16. Such registration "would surely prove a significant 'link in a chain' of evidence tending to establish . . . guilt." *Marchetti* v. *United States*, 390 U.S. 39, 48 (1968).

So it is with the *Williams* rule. If the physician comes forward with evidence that the abortion was necessary for "health" reasons, he must perforce admit presence at the scene, and performance of the very act charged in the indictment. His own testimony will suffice to corroborate the first element of the offense, namely, that he performed the abortion. Not only will his own testimony provide a "link" in the chain, it may provide both links to a two-link chain, that is, the entire chain. He will have admitted performing the abortion, and the jury may not believe his reasons for justification. Accordingly, a weak prosecution case may be fortified and proved from the physician's own testimony. Since *Williams* requires that testimony, the District of Columbia rule on burden of proof, or burden of persuasion, invades the physician's privilege against self-incrimination. Under *Leary*, and earlier supporting decisions,[51] this is not permissible.

[51] *See, e.g., Haynes* v. *United States*, 390 U.S. 85 (1968).

VI.

D.C. Code §22-201 Deprives Physicians and Their Patients of Rights Protected by the First, Fourth, Fifth, and Ninth Amendments, and Is Void by Reason of Overbreadth, Because Neither Narrowly Drawn Nor Supported by Any Compelling or Legitimate Governmental Interests.

Not only does Appellee challenge the vagueness of the statute, but also its substantive validity under the First, Fifth, and other amendments to the United States Constitution. This Court may hold that the statute is not uncertain and that it bears one or another construction which will sustain it. However, it is most unlikely that the statute, as written and re-enacted, can be construed to permit an abortion, in clinical surroundings, of a woman in good "health," who has had contraceptive failure, or did not for some reason utilize contraceptives. Such a woman is the individual whose request for an abortion, in the very early stages of pregnancy, is most frequent.

Even assuming that this Court enjoins the statute for vagueness, the further question of overbreadth should be reached and decided. This has been the practice of the Court in a wide variety of cases, particularly where freedom of association[52] was at issue, as it is here. "[It] would furnish a definitive ruling on a point of federal law for . . . future guidance . . ."[53] of the parties. A final "definitive ruling" on the federal questions raised hereinafter would

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[52] *See, e.g., NAACP* v. *Button,* 371 U.S. 415 (1963).

[53] *LSCREC* v. *Wadmond,* 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, *J.*).

avoid costs and delay, prevent continued litigation on the substantive issues, and conserve judicial time and resources.

Ultimately, the question presented is whether a State may enact a felony statute to punish a physician, a woman, and her husband, with up to ten years in federal prison, where the couple requests, and the physician performs, a therapeutic surgical procedure to abort a pregnancy which the couple did not want, but were unable to prevent. Under *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), it is clear that a husband and wife[44] are constitutionally privileged to control the size and spacing of their family by contraception. The failure of contraception, however, is commonplace.[45] Authoritative estimates are that between 750,000

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[44] *Griswold* was silent on the significant problem of access by unmarried persons to contraceptives. A result of non-access, and failure, is the birth of over 100,000 illegitimate children yearly to girls age nineteen or younger. *See* U.S. BUREAU OF THE CENSUS: *Statistical Abstract of the United States: 1969*, Table 59, at 50 (90th ed. 1969).

Outside of the state judiciary in Massachusetts, authorities have uniformly held the *Griswold* rationale applicable to litigants who had not entered into the marriage contract. *Compare Baird* v. *Eisenstadt*, —— F.2d ——, No. 7578 (1st Cir. July 6, 1970) (invalidating Massachusetts statute which outlawed distribution of contraceptives to the unmarried), *Mindel* v. *United States Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Calif. 1970) (reinstating postal clerk who had been dismissed for cohabitation without benefit of marriage), *and Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam) (Texas anti-abortion statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."), *with Sturgis* v. *Attorney General*, 260 N.E. 2d 687, 690 (Mass. 1970) (directly contrary to federal decision in *Baird*).

[45] If a married couple is to have private control over numbers and spacing of children, induced abortion is absolutely necessary as a backstop to contraceptive failure. For compilation of contraceptive failure rates according to method used, see P. EHRLICH & A. EHRLICH, POPULATION RESOURCES ENVIRONMENT 218-19 & Table

and 1,000,000 births each year are unwanted.[56] These are in addition to the 200,000 to 1,000,000 unwanted pregnancies which are estimated to end in abortions induced outside of the clinical setting.[57] Taken together, some 950,000 to 2,000,000 unwanted births plus non-clinical abortions occur yearly. Accordingly, one must conclude that restrictive anti-abortion statutes, such as the District of Columbia law in question here, drastically affect the conduct of literally millions of American citizens.

The national significance of the issues in this case can also be inferred from increased activity within the medical profession, and in the legislatures. On June 25, 1970, the House of Delegates of the American Medical Association voted to permit licensed physicians to perform abortions in hospitals, with the sole additional qualification that two other physicians be consulted.[58] Physicians were cautioned,

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9-1 (1970); N. EASTMAN & L. HELLMAN, WILLIAMS OBSTETRICS 1068-75 (13th ed. 1966); Hardin, *History and Future of Birth Control*, 10 PERSPECTIVES IN BIOLOGY & MED. 1, 7-13 (1966); Tietze, *Clinical Effectiveness of Contraceptive Methods*, 78 AM. J. OBST. & GYNEC. 650 (1959).

[56] The most recent scholarly examination of unwanted birth magnitudes will appear in a forthcoming issue of SCIENCE. A summary of these findings by Dr. Charles F. Westoff of Princeton University's Office of Population Research, analyzing the 1965 National Fertility Study, appeared in the N.Y. Times, Oct. 29, 1969, at 25, col. 3.

[57] Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. GEBHARD *et al.*, PREGNANCY, BIRTH AND ABORTION 136-37 (1958); F. TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED 25 (1936); Regine, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND QUART. No. 4, at 347-65 (1935).

[58] *See* N.Y. Times, June 26, 1970, at 1, col. 1. The statement has not yet been published in an official A.M.A. document. A recent

however, not to violate existing state statutes, forty-seven of which are far more restrictive.[59] Three states in 1970—New York, Alaska, and Hawaii—removed, for the most part, any criminal penalties which might previously have been imposed upon physicians for performing abortions in appropriate medical facilities.[60] From 1967 to 1970, twelve states had adopted therapeutic abortion statutes similar to that of the Model Penal Code's 1962 Proposed Official Draft.[61] More recently, on August 4, the Commissioners on Uniform State Laws issued a Second Tentative Draft of a UNIFORM ABORTION ACT. The Act sanctioned abortions by licensed physicians "within 24 weeks after the commencement of the pregnancy; or if after 24 weeks . . . " under the circumstances set out in the Model Penal Code proposal.

These developments bear witness to the importance of the issues presented here.

While policy-making and legislative bodies have debated the issue of abortion, courts, confined to the constitutional framework, have been asked to resolve the questions of individual privacy and legislative power which are pre-

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issue of the J.A.M.A. noted that only 26 physicians had resigned from the body because of new policy. 213 J.A.M.A. 1242 (Aug. 24, 1970).

[59] For analysis of abortion laws in the United States prior to the most recent changes, see Lucas, *Laws of the United States*, in I ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1966).

[60] *See, e.g.* [1970], N.Y. Laws ch. 127, at 170, *amending* N.Y. PENAL LAW §125.05(3) (McKinney 1967).

[61] *See* MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962). The states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

sented here. Although the questions framed in this case have not been decided by this Court, numerous federal and state decisions attest to the validity of the federal constitutional rights asserted here. Moreover, the sometimes sharp divisions in the courts below illustrate further the need for a decision at this level.

A. *The Rights to Give and Receive Medical Advice and Treatment*

The present action has First Amendment implications, namely the right of the physician to provide medical information, followed by treatment, for his patients, and the right of the patient to receive same. The right of a competent licensed physician to give medical advice can be characterized as free expression alone,[62] or when viewed as

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[62] Similarly, it is an aspect of the physician's general liberty under the Fifth Amendment to practice his chosen profession free from unconstitutional restraint. *See Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963); *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551 (1956); *Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966); *see also United States* v. *Freund*, 290 Fed. 411 (D. Mont. 1923), invalidating a Prohibition act which restricted the amount of alcohol a physician could prescribe:

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts took the path of desuetude. *See, e.g., United States* v. *Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L. Hand, *J.*); *United States* v. *One Package*, 86 F.2d 737 (2d Cir. 1936) (A. Hand, *J.*); *Youngs Rubber Corp.* v. *C. I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930) (Swan, *J.*).

an aspect of the physician-patient relationship, it becomes part of the freedom of association between physician and patient. The First Amendment has long been held to accord presumptive protection for the "freedom to associate and privacy in one's associations." *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). This has been the case with the marital relationship,[43] and that of attorney and client.[44] The relationship between physician and patient is no different; it promotes the fundamental purpose of maintaining the health and well-being of the American people.

The advice aspect of medical practice is but one part of Appellee's claim, for medical treatment involving interruption of the unwanted pregnancy may be what the patient ultimately requests, and the criminal statute proscribes.

> "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . must appear. . . ." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

The nature of this interest has been described by a "variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-77 (citations omitted).

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[43] *See Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965), describing the "marriage relationship" as

> "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

[44] *See NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railway Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar*, 389 U.S. 217 (1967).

Before discussing the possible State interests which have been offered to compel a woman to bear and raise children against her will, Appellee will examine various other rights of constitutional dimension which the challenged statutes curtail.

B. *The Rights of Marital and Personal Privacy*

The antecedents and progeny of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), offer generalized support for applying a presumptive constitutional right of privacy to encompass the right of a woman to have an abortion, in the early stages of pregnancy, when contraception failed or was not used.

Griswold is not an isolated decision confined to its facts, but is one in a continuing line of cases involving various aspects of personal privacy and family autonomy.[46] Most recently this Court recognized a "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) (Marshall, J.). Indeed, the *Stanley* case is of special importance, for there a majority of the Court embraced with approval the very significant language from Mr. Justice Brandeis' dissent in *Olmstead* v. *United States*:

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[46] Commentary on the *Griswold* case has been extensive. Particularly noteworthy materials include: Kelly, *Clio and the Court: An Illicit Love Affair* [1965] SUP. CT. REV. 119; Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34 (1967); Pilpel, *Birth Control and a New Birth of Freedom*, 27 OHIO ST. L.J. 679 (1966); Franklin, *The Ninth Amendment*, 40 TUL. L. REV. 487 (1966); Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979; *Symposium—Comments on the Griswold Case*, 64 MICH. L. REV. 197 (1965); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Note, *The Supreme Court—1964 Term*, 79 HARV. L. REV. 56, 162-65 (1965).

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." 277 U.S. at 478.

Olmstead's dissent was also quoted with approval by Burger, Circuit Judge, in *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1010, 1016-17 (D.C. Cir.) (*en banc*) (dissenting opinion), *cert. denied*, 377 U.S. 978 (1964).

The District of Columbia abortion law, if strictly construed, gives little consideration to a woman's feelings, pains, thoughts, and emotions. It impinges severely upon her dignity, her life plan, and her marital relationship if she has one. It is a first order invasion of her privacy with irreparable consequences.

Retired Justice Tom C. Clark has suggested that the concept of privacy should include control over family planning beyond the stage of contraception. He wrote:

"[A]bortion falls within that sensitive area of privacy —the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception,

why can he not nullify that conception when prevention has failed?" [46]

The protection of various rights in the marital and family context has firm origins in decisions dating back over fifty years.

A first and recent example, *Loving* v. *Commonwealth*, 388 U.S. 1, 12 (1967) (alternate ground of decision), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving* stands for the proposition that "the right to marry" is protected by the due process clause although not specifically mentioned in the Bill of Rights. The decision must lend further support to arguments that other important interests associated with marriage and the family are protected from arbitrary government intrusion.

Associated with the right to marry is the right to raise children, if one chooses, without arbitrary governmental interference. A unanimous Court indeed has held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime, but not of others similarly situated. *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942). Again, the right to have offspring is not mentioned in the Bill of Rights. However, the *Skinner* Court, composed of Justices Douglas (author of the opinion), Black, Reed, Frankfurter, Murphy, Byrnes, Roberts, Jackson, and Chief Justice Harlan Fiske Stone (the latter two wrote concurring opinions)

[46] Clark, *supra* note 34, at 9.

had no difficulty holding that this right was protected by the Constitution. Moreover, these members of the Court had all disassociated themselves from the economic substantive due process school of thought found in the much criticized and overruled opinion of *Lochner* v. *New York*, 198 U.S. 45 (1905).

Assuming, then, that the right to have offspring enjoys a constitutional presumption of protection, should not a right *not* to have offspring be of equal stature under the Constitution?

Further cases upholding rights associated with the family include *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), both of which were subsequently reaffirmed in *Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965). A unanimous Court in *Pierce* recognized a right to send one's children to private school. This right was derived from "the liberty of parents and guardians to direct the upbringing and eduction of children under their control." 268 U.S. at 534-35. The *Pierce* Court, moreover, included Justices who rejected the economic due process formula of *Lochner*, namely Justices Brandeis, Holmes, and Stone. On the basis of *Pierce*, is it not reasonable to argue that parents also should have a right to determine how many children whose "upbringing and eduction" they will direct? Not dissimilar to *Pierce* was *Meyer*, a 7-2 decision invalidating a State statute which prohibited the teaching of German to pupils below the eighth grade. The *Meyer* Court found that the due process clause included "the right . . . to marry, establish a home and bring up children." 262 U.S. at 399. Again, the decision is not objectionable as a manifestation of economic due process because it was joined by Justice Bran-

deis, among others, who rejected the *Lochner* scheme. The dissents, moreover, by Justices Holmes and Sutherland, rested on the assumption that the State had a substantial interest in assuring that foreign-born students and students of alien parentage had considerable training in the English language before being exposed to other languages.

Taken together, the *Griswold, Stanley, Loving, Skinner, Pierce,* and *Meyer* decisions all illustrate that the Constitution protects certain privacy and family interests from government intrusion unless a compelling substantial justification exists for the legislation.[67] Appellee contends that the right of a patient to determine whether to have additional children, and if not then to terminate a pregnancy in its early stages, is such a right, fully entitled to protection in the setting of this case.

C. *The Right of a Woman to Choose Whether and When to Bear and Raise Children*

In addition to the decisions upholding rights associated with personal and family privacy, an overlapping body of precedent extends significant constitutional protection to the citizen's sovereignty over his or her own body.

As early as 1891 this Court stated:

> "No right is held more sacred, [n]or is more carefully guarded . . . than the right of every individual to the

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[67] *See also Poe* v. *Ullman,* 367 U.S. 497, 551-52 (1961) (Mr. Justice Harlan, dissenting):

> "[T]he integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'" *Union Pac. Ry.* v. *Botsford,* 141 U.S. 250, 251 (1891), quoted in *Terry* v. *Ohio,* 392 U.S. 1, 8-9 (1968).

This right, like all rights, has limits, as illustrated by *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1904). There this Court upheld a compulsory vaccination law, but only to avoid "great dangers" and to protect "the safety of the general public." 197 U.S. at 29. The lengths to which the Court went, however, to justify a shot in the arm point up the degree to which personal autonomy is entitled to protection.

In marital and family matters relating to procreation, this Court has consistently recognized and sustained the individual's rights, and has done so on a constitutional plane. "The freedom to marry . . . ," *Loving* v. *Commonwealth,* 388 U.S. 1, 12 (1967); "the right to have offspring," *Skinner* v. *Oklahoma,* 316 U.S. 535, 536 (1942); and "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925), are all protected constitutional rights, embedded in American law, as is the right, at least of a married woman, to use contraceptives.

These rights, however, do not complete the set. Without a right to respond, a woman is at the mercy of possible contraceptive failure, particularly if she is unable or unwilling to utilize the most effective contraceptives. When

pregnancy begins, she is faced with a governmental mandate compelling her to serve as an incubator for months, and finally as an ostensibly willing mother for up to twenty or more years. Often she must forego a career or further education, and endure economic and social hardships. Under the present law she is given no other choice. Without the right to obviate contraceptive failure, other rights of privacy or family rights would be largely diluted. Continued pregnancy is compulsory, unless she can persuade the authorities that she is potentially suicidal, or that her "health" is otherwise endangered.

D. *The Fifth Amendment Due Process Right of a Presently "Healthy" Woman to Equal Access to a Therapeutic Abortion on the Same Terms as a Presently "Unhealthy" Woman*

A third interest of constitutional dimension infringed by the District anti-abortion statute is the "healthy" woman's interest in having access to abortion on the same terms as an "unhealthy" woman. Putting to one side the ambiguity of the "health" concept, the statute divides abortion applicants into two groups, the "healthy," and "unhealthy." The latter group may obtain a legal abortion without sanction, if they can find physicians willing to risk the possibility of prosecutorial abuse of the statute's vague terms. The "healthy" woman, however, whose "health" would not be damaged by continued pregnancy, is excluded. In spite of her and/or her husband's desire to postpone pregnancy, or not to have further children, she may not obtain a legal abortion without risking her physician's liberty and professional license. Indeed, while she is not personally liable, her husband and other family members who assist in arranging the abortion may be guilty as accomplices.

Although the Fifth Amendment has no specific equal protection clause, this Court has frequently held that similar standards apply to scrutiny of invidious discriminations under the due process clause of that Amendment. This is the necessary teaching of cases such as *Shapiro* v. *Thompson*, 394 U.S. 618, 641-42 (1969); and *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964). *Compare Shapiro* v. *Thompson*, *supra*, 394 U.S. at 663 (Harlan, *J.*, dissenting) (discussion of "the Equal Protection Clause of the Fourteenth Amendment [and] the analogous standard embodied in the Due Process Clause of the Fifth Amendment.").

This due process prohibition against invidious discriminations that lack rational justification is relevant here. As the analysis, *infra*, of possible governmental interests behind the abortion statute will show, the discrimination in the present case cannot be squared with the due process clause on any theory.

* * * * *

Numerous decisions by lower courts, in both the federal and state systems, bear witness that the rights asserted here are of constitutional dimension, and may be recognized by straightforward application of traditional constitutional principles.

In late September, 1969, the Supreme Court of California became the first appellate court to recognize the constitutional stature of a "fundamental right of the woman to choose whether to bear children . . . ."[46] The *Belous*

[46] *California* v. *Belous*, 71 Cal. 2d ——, ——, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied*, 397 U.S. 915 (1970).

court found this right implicit in this Court's "repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."[69]

More recently, three different decisions by statutory three-judge federal courts have invalidated restrictions on access to medical abortion in Wisconsin, Texas, and Georgia. The first, *McCann* v. *Babbitz*,[70] recognized in that jurisdiction a woman's

> "basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened." 310 F. Supp. at 302.

McCann grew out of the prosecution of a physician, but the three-judge court had no difficulty holding that a

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Belous, a state court appeal of a conspiracy conviction of a physician, involved a statute similar to that in the present case.

One year earlier, a California trial court had ruled that the Eighth and Fourteenth Amendments prohibited license revocation proceedings against physicians who had performed hospital approved abortions on patients exposed in early pregnancy to German measles. The opinion of the trial court, however, simply enumerated those Amendments among various conclusions of law, without supporting the conclusions with any attempt at reasoned analysis. Nonetheless, the result is of interest. *See Shively* v. *Board of Medical Examiners*, No. 590333 (Calif. Super. Ct., San Fran. County Sept. 24, 1968) (not reported), *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery, without reference to merits).

[69] 71 Cal. 2d at ——, 458 P.2d at 199, 80 Cal. Rptr. at 359, *citing, e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942).

[70] 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam), *appeal docketed*, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term).

physician has standing to assert the rights of pregnant patients."[11]

The second recent federal decision, *Roe* v. *Wade*,[12] declared the Texas anti-abortion statutes unconstitutional on the similar ground that

> "they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."

A third federal decision, *Doe* v. *Bolton*,[13] followed *Belous*, *McCann*, and *Roe*, holding:

> "[T]he concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.
>
> ". . . [T]he reasons for an abortion may not be proscribed. . . ."

Numerous lower courts have followed this lead, in both federal and state disputes.[14] In addition, three-judge courts

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[11] The standing of a physician to assert a patient's rights along with his own follows from *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965), and *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953). On this standing point, lower court decisions involving abortion laws all agree. *See also Planned Parenthood Ass'n of Phoenix* v. *Nelson*, Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Doe* v. *Bolton*, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam); *Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 273 (S.D.N.Y. May 12, 1970).

[12] —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam).

[13] —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam).

[14] *See, e.g., State* v. *Munson* (S.D. 7th Jud. Cir., Pennington County Apr. 6, 1970) (Clarence P. Cooper, J.) (recognizing the woman's "'private decision whether to bear her unquickened child'"); *State* v. *Ketchum* (Mich. Dist. Ct. Mar. 30, 1970) (Reid,

have been convened in a number of states to consider actions quite similar to that presented here.[75]

The Distinction Between Personal and Economic Rights Under the Due Process Clause and the Relevance of the Ninth Amendment as an Aid to Construction

Appellee's position is by no means an assertion that courts ought "to roam at large in the broad expanses of policy and morals,"[76] nor that this Court should "sit as a super-legislature to weigh the wisdom of legislation nor to

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J.) ("the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment."); *Commonwealth* v. *Page*, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970) (Campbell, *P.J.*) ("the abortion statute interferes with the individual's private right to have or not to have children."); *People* v. *Gwynne*, No. 176601 (Calif. Mun. Ct., Orange County Aug. 13, 1970) (Schwab, *J.*); *People* v. *Gwynne*, No. 173309 (Calif. Mun. Ct., Orange County June 16, 1970) (Thomson, *J.*); *People* v. *Barksdale*, No. 33237C (Calif. Mun. Ct., Alameda County Mar. 24, 1970) (Foley, *J.*); *People* v. *Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County Jan. 9, 1970) (Mast, *J.*); *cf. United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 272-73 (S.D.N.Y. 1970) (questions substantial, but habeas petitioner-physician remitted to state courts).

[75] *See, e.g., Gwynne* v. *Hicks*, Civ. No. 70-1088-CC (C.D. Calif., filed May 18, 1970); *Arnold* v. *Sendak*, IP 70-C-217 (S.D. Ind., filed Mar. 29, 1970); *Corkey* v. *Edwards*, Civ. No. 2665 (W.D.N.C., filed May 12, 1970); *YWCA of Princeton* v. *Kugler*, Civ. No. 264-70 (D.N.J., filed Mar. 5, 1970); *Hall* v. *Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969), *dismissed as moot* Op. No. 36936 (S.D.N.Y. July 1, 1970) (per curiam) (statute repealed); *Benson* v. *Johnson*, Civ. No. 70-226 (D. Ore., filed Aug. 4, 1970).

[76] *Adamson* v. *California*, 332 U.S. 46, 90 (1947) (dissenting opinion of Mr. Justice Black). *See also Griswold* v. *Connecticut*, 381 U.S. 479, 507 (1965) (Black, *J.*, dissenting); *id.* at 527 (Stewart, *J.*, dissenting); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963).

decide whether the policy which it expresses offends the public welfare."[11] Here, as in *Griswold*, the position is that there are certain sacred rights associated with individual privacy and the marital relation. These rights have already been held to include the rights to marry, have children, not have children (by use of contraceptives), and raise children. Appellee claims that these rights also include the right not to have children in the case where pregnancy can be terminated in its early stages by means of an induced or therapeutic abortion. This is by no means a novel claim in light of the lines of decision discussed above.

Two distinctions can be made which limit the scope of the principle asserted: first, that there are constitutional justifications for treating "personal" rights differently from purely "economic" rights in cases arising under the due process clause, and second, that there are even weightier considerations for treating "privacy" and "marital" rights with great solicitude in order to protect these most important areas from legislative experimentation. *Griswold* recognized these distinctions. Writing for the majority Mr. Justice Douglas reaffirmed the proposition that the Court does not

> "sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482.

However, the Court recognized an important distinction where the challenged statute

> "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. at 482.

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[11] *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952).

That is precisely the type of situation presented by this case, and the kind of circumstance envisioned by the concurring opinion in *Griswold* by Mr. Justice Goldberg:

> "I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory; and try novel social and economic experiments . . .' I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . . ." 381 U.S. at 496.

It is apparent, moreover, that Justices Holmes, Brandeis, Stone, Jackson, Frankfurter, and Reed also took this position. They consistently rejected an economic due process approach, but joined in due process opinions which protected fundamental "personal" liberties. These have already been discussed at length.

In addition, there are more recent expressions which indicate a different standard for testing "legislation [which] touches upon fundamental individual and personal rights essential to maintaining the independence, integrity, and private development of a citizen in a highly organized, yet democratic society." [78] The several "right to travel" cases recognized a right which is nowhere spelled out in the Constitution or Bill of Rights,[79] as do decisions which

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[78] Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 224 (1965). Professor Emerson suggests that this "distinction is . . . a fundamental one," *id.*, and analyzes cases which can be explained on such a basis. *E.g.*, *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

[79] *E.g.*, *Aptheker*, *supra*; *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *United States* v. *Laub*, 385 U.S. 475 (1967); *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Lynd* v. *Rusk*, 389 F.2d 940 (D.C. Cir. 1967); *see United States* v. *Guest*, 383 U.S. 745, 757-59 (1966) (Stewart, J.):

(*footnote continued on next page*)

broadly protect freedom of "association" far beyond the mere articulation of ideas and into the sphere of organized action."[10] A majority of this Court last Term, in a case concerning allocation of government economic benefits among applicants with diverse needs, recognized the continuing validity of this distinction. A distinction was drawn between "state regulation in the social and economic field," and that "affecting freedoms guaranteed by the Bill of Rights . . . ." *Dandridge* v. *Williams*, 397 U.S. 471, 484 (1970). In *Dandridge*, the Court divided as to which standard and which characterization should apply. In the present case, there is no room for difference. The conflict here involves state interference in wholly private behavior. Moreover, the behavior intimately concerns the family, and the highly personal decision of a woman as to whether she should assume the life-long responsibilities that inhere in allowing a newly-begun pregnancy to continue.

Principled justification exists for making this distinction.[11] The Constitution grants plenary power to the legislative branch to regulate commerce and to levy taxes for

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"The Constitutional right to travel . . . occupies a position fundamental to the concept of our Federal Union. • • • [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . . . • • • All have agreed that the right exists."

[10] *See, e.g., United Mine Workers* v. *Illinois State Bar*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963).

[11] The personal-economic dichotomy is also suggested in *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 215-24 (1952); *cf.* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 371-73 (1949) (similar dichotomy suggested for equal protection setting).

the general welfare. It grants no such power to the courts for appraising economic legislation. On the other hand, the Constitution grants considerable power to the courts for the purpose of protecting certain basic human rights. And, the Constitution grants no such power to the legislative branch for the purpose of experimenting with basic human rights because these rights are to be protected rather than subjected to legislative regulation. It follows, therefore, in light of the due process clause and the Ninth Amendment (discussed below), that the judiciary is charged with the protection of those rights in the Bill of Rights and other non-economic fundamental rights which have not been enumerated, such as those associated with the family, particularly where *federal* governmental action is present, as here.

Significantly, the text of the Constitution does not prohibit the courts from protecting basic human rights which are not enumerated. The draftsmen of the Bill of Rights could certainly have used language to limit the courts to protecting only those rights which were specifically named. The very opposite was done, however, by the expansive language of "rights" "not enumerated," "privileges and immunities," and "due process of law." These latter terms, moreover, were written against the background of Chief Justice Marshall's statement in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), that:

> "We must never forget that it is a Constitution we are expounding . . . intended to endure for ages to come, and consequently to be adapted to the various crises in human affairs."

Similarly, Mr. Justice Brandeis wrote:

"Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world .... The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government ... will be enabled to expose to a jury the most intimate occurrences of the home .... Can it be that the Constitution affords no protection against such invasions of individual security?"

Olmstead v. *United States,* 277 U.S. 438, 472, 474 (1928) (dissenting opinion).

Finally, what was said by Mr. Justice Stewart in a post-*Griswold* decision may be aptly paraphrased to apply in the present context:

"The Constitutional right [of marital privacy] ... occupies a position fundamental to the concept of our Federal Union. * * * [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be ... necessary ...."

United States v. *Guest,* 383 U.S. 745, 757-58 (1966). Can it be that a right of marital privacy, or personal privacy or autonomy, occupies a lesser position than a right to travel from state to state?

One basic purpose of the first nine amendments could not have been to render the courts helpless in the face of government intrusion upon personal and marital privacy. What has been said concerning the due process clause and the distinction between personal and economic rights finds

further support in the Ninth Amendment, as recognized in the *Griswold* concurrence by Mr. Justice Goldberg, Chief Justice Warren, and Justice Brennan.[32]

Justice Goldberg summarized his interpretation of the Ninth Amendment as follows:[33]

> "I do not mean to imply that the Ninth Amendment is applied against the State by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the State or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated and an intent that the list of rights included there not be deemed exhaustive." 381 U.S. at 492.

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[32] Post- and pre-*Griswold* discussions of the Ninth Amendment have surveyed its history in the convention and the courts. They point to the accuracy of Mr. Justice Goldberg's interpretation, as contrasted with that of the dissents. *See generally* Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Franklin, *The Ninth Amendment*, 40 TUL. L. REV. 487 (1966); *Symposium—Comments on the Griswold Case*, 64 MICH. L. REV. 197, 207, 227-28, 254-55, 268-71 (1965); Redlich, *Are There "Certain Rights . . . Retained by the People?"* 37 N.Y.U. L. REV. 787 (1962).

[33] The Note cited above, 33 U. CHI. L. REV. at 825, reaches the same conclusion after an exhaustive study of the Ninth Amendment:

> "In summary, whether one reads the history of the ninth as foreclosing the 'imperfect enumeration' theory, or as attempting to avoid future definitional problems, the amendment clearly remains a rule of construction with the purpose of obviating the possibility of interpreting the first eight amendments as exclusive. It is not, as its history indicates, either a source or a summary of those unenumerated rights."

No specific constitutional provision covers the rights to marry, raise children, travel, attend private school, to dress as one chooses, to pursue one's chosen profession, or a host of rights which might someday be invaded by legislatures. The framers could hardly be expected to undertake the herculean task of listing all personal rights which might be regarded as of equal stature to those more specifically spelled out. Therefore, it appears, they enacted the Ninth Amendment.

Recognition of the rights being asserted on this appeal would not usher in a vast increase in judicial power. What has been said pertaining to *Griswold* applies here:

> "*Griswold* v. *Connecticut* is a reaffirmation of a power long exercised by the Court in protecting fundamental rights. It required no judicial roving at large to reach the conclusion that the freedom of the marital relationship is a part of the bundle of rights associated with home, family, and marriage—rights supported by precedent, history, and common understanding. For a court to find that these rights are fundamental, whether because they are deeply written in the tradition and conscience of our people, are part of the concept of ordered liberty, are implicit in the notion of a free society, or emanate from the totality of the constitutional order, involves no immodest or startling exercise of judicial power. The decision operates within a narrow sphere. In exercising its power in *Griswold* to protect a fundamental personal liberty, the Court, far from advancing to a new milepost on the high road to judicial supremacy, was treading a worn and familiar path.

Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 258 (1965). And, as Professor Sutherland suggested, "[i]f anyone rebels at the thought of entrusting this power to the nine Justices, he may well consider for a little while to whom he would prefer to entrust it; this can be a sobering experience." Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 288 (1965).

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Accepting, then, that Appellee, physicians similarly situated, and their patients are rightfully asserting fundamental rights of constitutional dimension, it is necessary to evaluate the competing interests of the government.

Two governing principles must be satisfied to sustain this statute: Its provisions must be (1) narrowly drawn, and (2) supported by compelling governmental interests. As outlined in the majority and concurring opinions in *Griswold:*

> "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP* v. *Alabama*, 377 U.S. 288, 307." 381 U.S. at 485.
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> "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing

a subordinating interest which is compelling.' *Bates* v. *Little Rock*, 361 U.S. 516, 524." 381 U.S. at 497 (concurring opinion of Goldberg, *J.*).

E. *Insufficiency of Governmental Interests*

1. Interests discernible from legislative and common law history

Specific legislative history setting out the rationale behind the challenged statute, what the measure sought to achieve, why, and how, is not available. The current statute, D.C. Code §22-201, is derived from D.C. Code §809, 31 Stat. 1322 (1901), which until 1951 provided a lesser penalty for the identical offense described in the current statute. The 1901 statute superseded, but was not necessarily derived from an 1872 Act of the Territorial Legislative Assembly.[84] The latter appears to have been derived from an 1868 Maryland statute,[85] and that from the common law.

At common law an abortion could be performed without any penalty prior to the period of pregnancy called "quickening," *i.e.*, 16-18 weeks.[86] This principle was accepted in *Lamp* v. *Maryland*, 67 Md. 524, 10 Atl. 298 (1887) (quoting

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[84] ABBOT, COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA ch. XVII, §§13-15 (1894). Section 15 exempted from criminal sanction "any case of abortion produced or caused by regular physicians for the purpose of preserving the life of any woman pregnant . . . ."

[85] MD. CODE ANN. ch. 179, §2 (1868), exempted "the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians, he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother."

[86] *See* L. AREY, DEVELOPMENTAL ANATOMY 106-07 (Reference Table of correlated Human Development) (1965 ed.).

Lord Coke), and was the rule in the overwhelming majority of other jurisdictions.[87] From 1828 onward, however, states began to modify the common law rule by legislation which prohibited all forms of abortion (other than spontaneous) at all stages of pregnancy.[88] Maryland, in 1868, and the Territory of the District, in 1872, were among the first to follow suit.

Careful historical analysis[89] has shown that the new statutes had a medical purpose and were not designed to compel any particular moral view. Before the turn of the century all internal surgery was dangerous, for medical science, in its infancy, knew nothing about cleanliness. Sir

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[87] *See Hunter* v. *Wheate*, 53 App. D.C. 206 (D.C. Cir. 1923); *Smith* v. *Gaffard*, 31 Ala. 45 (1857); *Eggart* v. *Florida*, 40 Fla. 527, 25 So. 144 (1898); *State* v. *Alcorn*, 7 Idaho 599, 64 Pac. 1014 (1901); *Abrams* v. *Foshee*, 3 Iowa 274, 66 Am. Dec. 77 (1856); *Mitchell* v. *Commonwealth*, 78 Ky. 204, 39 Am. Rep. 227 (1879); *Smith* v. *State*, 33 Me. 48, 54 Am. Dec. 607 (1851); *Commonwealth* v. *Bangs*, 9 Mass. 387 (1812); *Evans* v. *People*, 49 N.Y. 86 (1872); *Edwards* v. *State*, 79 Neb. 251, 112 N.W. 511 (1907); *State* v. *Cooper*, 22 N.J.L. (2 Zab.) 52, 51 Am. Dec. 248 (1849); *State* v. *Tippie*, 89 Ohio St. 35, 105 N.E. 75 (1913); *State* v. *Ousplund*, 86 Ore. 121, 167 Pac. 1019 (1917), *appeal dismissed per stip.*, 251 U.S. 563 (1919); *Gray* v. *State*, 77 Tex. Crim. 221, 178 S.W. 337 (1915); *Miller* v. *Bennet*, 190 Va. 162, 56 S.E.2d 217 (1949); *State* v. *Dickinson*, 41 Wis. 299 (1877). *See generally* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) [hereinafter Means]. Contrary decisions, based upon little or no historical research, are *Mills* v. *Commonwealth*, 13 Pa. St. 631 (1850); *Willis* v. *O'Brien*, 151 W.Va. 628, 153 S.E.2d 178, *cert. denied*, 389 U.S. 848 (1967); *State* v. *Slagle*, 83 N.C. 630 (1880).

[88] *See, e.g.*, N.Y. Rev. Stat., pt. IV, ch. 1, tit. 6, §§20-22 (1829); Ill. Rev. Code, §46 (1827); *see generally* George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. Res. L. Rev. 371 (1966); Lucas, *Laws of the United States*, in I Abortion in a Changing World 127 (R. Hall ed. 1970).

[89] *See* Means, *supra* note 87 *passim*.

Joseph Lister's findings on antiseptic techniques were not printed until 1867, and did not gain acceptance in the major hospitals of the Eastern United States until nearly 1890.[90] Without such information and techniques (which we take for granted today), a simple doctor's office procedure—such as the opening of an abscess—could lead to serious infection and even death. Early court decisions on abortion fully recognized these medical facts.[91] It was recognized that the woman's interests were at stake, for all that she was as an adult human being, and everything that she meant to her family. Her actual interests were being protected in the 1800's from the dangers of surgery. She was the victim, not the criminal, and accordingly was never prosecuted.

Medicine changed rapidly after 1890, but the law was slow to follow suit. Originally the statutes were passed to protect the woman's life and health. Subsequently the same statutes, by prohibiting medical abortions, had the opposite

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[90] Lister's work was written up in an 1867 number of *The Lancet*. Earlier discoveries along the same lines had been made by Semmelweis and Oliver Wendell Holmes, Sr. *See* Holmes, *The Contagiousness of Puerperal Fever* (1843); I SEMMELWEIS, THE AETIOLOGY CONCEPT, AND PROPHYLAXIS OF CHILDBIRTH FEVER (1861). *See generally* H. ROBB, ASEPTIC SURGICAL TECHNIQUE WITH ESPECIAL REFERENCE TO GYNAECOLOGICAL OPERATIONS (1875); C. HAAGENSEN & W. LLOYD, A HUNDRED YEARS OF MEDICINE (1943).

[91] *See, e.g., State* v. *Murphy*, 27 N.J.L. (3 Dutcher) 112, 114-15 (Sup. Ct. 1858):

> "The design of the statute was not to prevent the procuring of abortions, so much as *to guard the health and life of the mother against the consequences of such attempts . . . . It is immaterial* whether the foetus is destroyed, or whether it has quickened or not. • • •
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> "*The offense of third persons*, under the statute, *is mainly against her life and health.* The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment." [Emphasis added.]

effect and forced a woman into the underground of non-medical abortion. Thus, throughout this century, non-medical abortion has been a major cause of maternal death, injury, infection, and sterility,[92] for the simple reason that physicians would refuse to do medical abortions out of fear of prosecution.

Accordingly, the legal and medical history of abortion show at least one legitimate governmental concern, the protection of pregnant women from dangers then inherent in surgery. In fact, a statute was proposed in New York in 1828 which would have punished "any surgical operation . . . unless it appear that the same was necessary for the preservation of life . . . ."[93] This concern was echoed as late as 1943 in *Williams* v. *United States,* 78 U.S. App. D.C. 147, 150, 138 F.2d 81, 84 (1943) ("The dangers of abortion . . . come from . . . incompetent, unscrupulous practitioners, operating in secrecy, without antiseptic conditions. . . . "). *Williams,* however, was decided only a few years after curretage began to be used routinely in hospital treatment of incomplete abortions,[94] and at the same time that antibiotics came into use.[95]

In addition to concern with surgical dangers, the statute may have been an effort to enforce a brand of sexual

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[92] Early estimates were that non-medical abortions caused up to 10,000 deaths per year. *See* J. Bates & E. Zawadzki, Criminal Abortion 3-4 (1964). With the advent of antibiotics, however, 500-1000 is a more reliable estimate today. *See* Hall, *Commentary* in Abortion and the Law 228 (D. Smith ed. 1967).

[93] 6 N.Y. Revisers' Notes, pt. IV, ch. 1, tit. 6, §28, at 75 (1828).

[94] Douglas, *Toxic Effects of the Welch Bacillus in Postabortal Infections,* 56 N.Y. State J. Med. 3673 (1956).

[95] *Id.*

morality that considered reproduction as the only legitimate goal of sexual relations, and this, of course, only within the marital relationship. Thus, the *Williams* case expresses a disapproval of "[a]rguments that abortion should be permitted to avoid social disgrace or poverty or illegitimacy. . . ." 78 U.S. App. D.C. at 149.

Similarly, the common law and early decisions enforced a prohibition against abortions late in pregnancy, expressing the dual concern that late abortions posed increased hazard to the woman, and terminated the development of the foetus after signs of life had come into view. *See United States* v. *May,* 2 MacArthur (9 D.C.) 512 (1876). Nowhere, however, is there any historical basis for projecting any past or present legislative effort to equate the foetus or embryo in early pregnancy with a "person," as that term is used in the Constitution where citizenship depends upon birth or naturalization.

In light of this sparse legislative history, the final inquiry is whether the statute today is narrowly drawn to serve any compelling governmental interest. As Appellee has shown before, discussing vagueness, the statute on its face is far from narrowly drawn to meet any overt interest expressed in its ambiguous terminology.

2. The statute is not a rational public health measure in 1970

Whether the District's abortion statute, with its potentially drastic sweep, can be independently justified as promoting public health in 1970 is not even a close question. The statute clearly does not generate a more healthy female population. Rather, it creates "a public health problem of

pandemic proportions"[96] by denying to women the opportunity to obtain safe medical treatment in controlling their personal reproduction."[97]

As other courts, and all available medical studies have recognized, abortion under appropriate clinical surroundings is considerably safer—six or seven times—than ordinary childbirth.[98] Today abortion *per se* has no rational relationship to any medical hazards. It is only abortion in an unsanitary setting, or when undertaken by a non-physician, that is dangerous.[99] Yet, the statute is not so limited. It sweeps broadly to prevent a potentially all-inclusive class of pregnant women from obtaining abortions under any circumstances whatsoever. There is no carefully tailored effort to discern the optimum circumstances under which abortions are safest. Indeed, a 1821 statute could not be expected to have continued validity today when the health field has advanced beyond all ex-

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[96] Hall, *Abortion in American Hospitals*, 57 Am. J. Pub. Health 1933, 1934 (1967).

[97] Some will contend that women themselves, not the statute, create their own public health quandries by refusing the role of compulsory motherhood and seeking non-medical abortion as a last resort. But that is a bootstrap contention which the Government may not make. The statute itself must be said to create the health problems, for its very terms foreclose access to safe medical abortion in many if not most cases of pregnancy.

[98] *See* Tietze, *Mortality With Contraception and Induced Abortion*, 45 Studies in Family Planning 6 (Sept. 1969); *Babbitz* v. *McCann*, *supra*, 310 F. Supp. at 301; *California* v. *Belous*, 71 Cal.2d ——, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969). The most comprehensive and recent data on the safety of medically induced abortions is set out in great detail in Tietze, *Abortion Laws and Abortion Practices in Europe*, Excerpta Medica International Congress, Series No. 207 (Apr. 1969).

[99] *See* S. Kleegman & S. Kaufman, Infertility in Women 301 (1966), describing non-medical abortion as "one of the most important causes of subsequent infertility and pelvic disease."

pectations. In fact, it should be no surprise that a health measure of 1901 would have the opposite effect today, namely, that the statute itself creates health problems of great magnitude.

3. The statute is not rationally related to any legitimate governmental policy on control of human sexual behavior

To some extent, legislative history reflected a moral tone to the effect that sexual relations, in or out of marriage, ought to end in childbirth. An arguable corollary to this moral tone would be the condemnation of premarital sexual relationships, which tone assuredly prevailed around the turn of the century.

Some might even argue that sexual promiscuity will be curtailed by restricting abortion to the classes in the statute.[100] However, an "unhealthy" prostitute can have all the abortions she can pay for, while a "healthy" married woman must continue to endure one pregnancy after another, until her "health" breaks down. Government can directly curtail promiscuity by enforcing its adultery and fornication laws, if it so chooses. The abortion statute, however, sweeps broadly to prevent all abortions on "healthy" women, married and unmarried, whether previously chaste or promiscuous. Moreover, compulsory pregnancy and unwanted childhood are severe penalties to pay for a single act of "promiscuous" intercourse. In related

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[100] In response to this argument, Dr. Kenneth Ryan stated: "The fear that the availability of abortion will lead to promiscuity is sheer nonsense." Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 432 (1965).

The earliest cases specifically disavowed enforcement of Victorian "morals and deceny" as a possible object of the abortion laws, emphasizing that the central purpose was "to guard the health and life of the female. . . ." *State* v. *Gedicke*, 43 N.J.L. (14 Vroom) 86, 89 (Sup. Ct. 1881).

settings, it has been held that "promiscuity prevention" cannot support a broad and sweeping statute. *See King* v. *Smith*, 392 U.S. 309, 320 (1968); *Griswold* v. *Connecticut*, 381 U.S. 479, 498 (1965) (Mr. Justice Goldberg, concurring). Indeed, all evidence seems to indicate that the vast majority of abortions are sought by married women with two or more children.[101]

4. The statute is not designed to equate the early products of conception with human persons

Briefs filed by two *amici curiae* have argued at length that Congress has made a legislative judgment, or should have, that the products of conception are to be equated with human persons, from the time of fertilization of the ovum. There is, however, no basis in historic or legislative fact to infer that Congress even considered such a possibility. Nor is there any rational justification for compelling a pregnant woman to accept such a metaphysical approach, when contrary to her personal beliefs.

Amici's argument primarily fails because it has never been considered cogent by the Congress. As Appellee has previously shown, the statute was enacted with quite a different purpose in mind, namely the protection of a woman's health from the dangers inherent many years ago in surgical procedures. Induced abortion, because medically dangerous, was prohibited unless necessary to avoid medical complications equal to or greater than those incident to continued pregnancy and eventual childbirth. The focus was not and could not have been the extension of legal "rights" to a developing embryo or fetus. If Congress had

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[101] *See* Tietze, *supra* note 42, at 206 (Hungary, 86% married; Czechoslovakia, 82% married). American data are in accord. P. Gebhard, Pregnancy, Birth and Abortion 96-99 (1958).

been acting as *amici* suggest, there would have been no reason for differentiating between an embryo according to the health condition of the pregnant woman. It would be strange to legislate "rights" for an embryo only when the pregnant woman was "healthy," but not when she was "unhealthy." If the embryo had been accorded "rights" superior to those of the woman under any circumstances, the rights could hardly have been considered secondary simply because the woman became "unhealthy" as a consequence of pregnancy. If one imagines, for example, the case of pregnancy caused by rape, forced childbirth would invariably damage the woman's mental if not physical health. The fetus, however, would be no different, aside from the tragic events of its origin, than a fetus in a perfectly healthy woman. Yet, the fetus in the healthy woman would have "rights" superior to those of the woman herself.

The fact that Congress classified the pregnant woman as the "victim" rather than the criminal is also a clear indication of legislative intent. In no case is the woman punished, although she is always the very party who seeks out and persuades the physician to perform the abortion. If Congress had been concerned with bestowing rights on a fetus, there would have been no reason whatever for exempting the woman from liability. Indeed, prosecution of women who obtain abortions is unknown to American law. Since the statute was enacted to protect the woman from dangers in surgery, there was little reason to hold her responsible criminally. Government does not punish the victim, but only the offender. The victim, according to Congress, is the woman, and the offender is the physician. Whatever "rights" may accrue thereby to an embryo do so indirectly, and not by any apparent design of Congress.

Amici have endeavored to argue, by reference to decisions in one or more state courts, that certain property and tort "rights" are bestowed upon an embryo. Again, private law decisions from state courts cast little light upon the intent of Congress in enacting a statute restricting abortion to a limited class of pregnant women. Moreover, the presupposition of all such decisions is that a human person has rights that relate back to incidents occurring before birth. The common law treated abortion as a private matter of the woman until advanced stages of pregnancy. This common law developed side-by-side with tort and property law. Neither contradicts the other. It is one thing to hold that injuries to a viable fetus give rise, after birth, to an action for negligence. It is quite another to suggest that these rights entail recognition of the embryo as a human person from the moment at which the injury occurred. Congress has not so acted.

Finally, *amici* have attempted to point out various arguable similarities between developing embryos and their subsequent products, human persons. In addition to such resemblances, there are an equal or greater number of differences. Congress, however, has never engaged in the process of weighing these differences versus similarities. *Amici* wholly fail to explain how it can be inferred that Congress has or would make the value judgments urged in their Briefs. If Congress has—like the American Medical Association and Commissioners on Uniform State Laws—disagreed with the values asserted by *amici*, it is not the province of this Court to overturn such a legislative judgment. In particular, Appellee fails to understand how the fertilized ovum, microscopic in size, could suddenly be endowed with all of the rights and immunities suggested by *amici*. The living ovum, and equally living sperm, possess

potential life in the same sense that a fertilized ovum subsequently possesses life. However, this life is not sufficiently developed to have come within the recognition of law. As Justice Clark has stated:

> "The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation." [102]

It requires no speculation to discern that Congress has never accepted the drastic position argued by *amici*.

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The above appear to be the only remotely relevant justifications the Government might offer to support its present statutory restrictions on abortion. As shown, none amounts to "'a subordinating [Government] interest which is compelling. . . .'" None embodies the requisite "'[p]recision of regulation. . . .'" *Griswold* v. *Connecticut*, 381 U.S. 479, 497, 498 (1965). Accordingly, unless the Government can bring forth compelling justifications of another variety, the restrictive classifications must be struck from the statute and abortion made available to the "healthy" woman as well as the "unhealthy."

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[102] Clark, *supra* note 34, at 9-10.

CONCLUSION

For the reasons set out in this Brief, the Judgment below dismissing the indictment should be affirmed.

Respectfully submitted,

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